

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

CARLOS MCDANIEL,  
 Plaintiff,

vs.

CAROLYN W. COLVIN, Acting Commissioner  
 of Social Security Administration,  
 Defendant.

Case No. 2:14-cv-00994-APG-CWH

**REPORT AND**  
**RECOMMENDATION**

This case involves judicial review of an administrative action by the Commissioner of Social Security (“Defendant”) denying Plaintiff Carlos McDaniel’s (“Plaintiff”) application for supplemental security income under Title XVI of the Social Security Act. Before the Court is Plaintiff’s Motion for Reversal or Remand (ECF No. 19), filed January 13, 2015, and Defendant’s Response and Cross-Motion to Affirm (ECF Nos. 22, 23),<sup>1</sup> filed March 17, 2015. Plaintiff did not file a Reply. This action was referred to the undersigned magistrate judge for a report of findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(B)-(C) and Local Rule IB 1-4.

**BACKGROUND**

Plaintiff applied for supplemental security income on July 5, 2011. AR<sup>2</sup> 79-87. Plaintiff’s claim was denied initially on September 20, 2011, and upon reconsideration on December 1, 2011. AR 52-55. A hearing was held before an Administrative Law Judge (“ALJ”) on October 5, 2012. AR 21-49. On October 19, 2012, the ALJ issued a decision finding plaintiff was not disabled from July 5, 2011 through the date of the decision. AR 27. Thereafter, the Appeals Council denied

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<sup>1</sup> Defendant filed both an opposition to Plaintiff’s motion and a cross-motion to affirm. See ECF Nos. 22, 23. This Court’s review of these two documents reveals that the arguments presented are identical. Therefore, this Court refers only to Defendant’s cross-motion, ECF No. 22, even though an identical argument is presented in Defendant’s opposition, ECF No. 23.

<sup>2</sup> AR refers to the administrative record lodged with this Court. See ECF No. 12.

1 Plaintiff's request for review, rendering the ALJ's decision final.<sup>3</sup> AR 1-6. Plaintiff, on June 19,  
 2 2014, commenced the instant action for judicial review pursuant to 42 U.S.C. §§ 405(g) and  
 3 1383(c). See ECF No. 1.

## 4 DISCUSSION

### 5 **I. LEGAL STANDARDS**

#### 6 **A. Judicial Standard of Review**

7 The court reviews administrative decisions in social security disability benefits cases under  
 8 42 U.S.C. § 405(g). Section 405(g) states that "[a]ny individual, after any final decision of the  
 9 Commissioner of Social Security made after a hearing to which he was a party, irrespective of the  
 10 amount in controversy, may obtain a review of such decision by a civil action . . . brought in the  
 11 district court of the United States for the judicial district in which the plaintiff resides." The court  
 12 may enter, "upon the pleadings and transcripts of the record, a judgment affirming, modifying, or  
 13 reversing the decision of the Commissioner of Social Security, with or without remanding the case  
 14 for a rehearing." Akopyan v. Barnhart, 296 F.3d 852, 854 (9th Cir. 2002). The Ninth Circuit  
 15 reviews de novo a decision issued by a district court in such cases. Batson v. Comm'r, Soc. Sec.  
 16 Admin., 359 F.3d 1190, 1193 (9th Cir. 2003).

17 The Commissioner's findings of fact are conclusive if supported by substantial evidence.  
 18 42 U.S.C. § 405(g); Ukolov v. Barnhart, 420 F.3d 1002, 1004 (9th Cir. 2005). However, these  
 19 findings may be set aside if they are based on legal error or not supported by substantial evidence.  
 20 See Stout v. Comm'r, Soc. Sec. Admin., 454 F.3d 1050, 1052 (9th Cir. 2006); see also Thomas v.  
 21 Barnhart, 278 F.3d 947, 954 (9th Cir. 2002). Substantial evidence is "more than a mere scintilla  
 22 but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as  
 23 adequate to support a conclusion." Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995). In  
 24 determining whether the Commissioner's findings are supported by substantial evidence, a court  
 25 reviews "the administrative record as a whole, weighing both the evidence that supports and the  
 26 evidence that detracts from the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,

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 28 <sup>4</sup> The ALJ's decision becomes the final administrative decision of defendant.

720 (9th Cir. 1998). The Commissioner’s findings must be upheld if supported by inferences reasonably drawn from the record. Batson, 359 F.3d at 1193. When the evidence supports more than one rational interpretation, a court must defer to the Commissioner’s interpretation. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). Consequently, the issue is not whether the Commissioner could reasonably have reached a different conclusion, but whether the final decision is supported by substantial evidence.

It is incumbent on the ALJ to make specific findings so the court does not speculate as to the basis of the findings when reviewing the Commissioner’s decision. Mere cursory findings of fact without explicit statements as to what portions of the evidence were accepted or rejected are not sufficient. Lewin v. Schweiker, 654 F.2d 631, 634 (9th Cir. 1981). The ALJ’s findings “should be as comprehensive and analytical as feasible, and where appropriate, should include a statement of subordinate factual foundations on which the ultimate factual conclusions are based.” Id. at 635.

#### **B. Disability Evaluation Process**

An individual seeking disability benefits has the initial burden of proving disability. See Roberts v. Shalala, 66 F.3d 179, 182 (9th Cir. 1995). An individual must demonstrate the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months.” See 42 U.S.C. § 423(d)(1)(A). The individual must provide “specific medical evidence” in support of the claim for disability. 20 C.F.R. § 404.1514. If the individual establishes an inability to perform his or her prior work, then the burden shifts to the Commissioner to show that the individual “can perform other substantial gainful work that exists in the national economy.” Batson, 157 F.3d at 721.

The ALJ follows a five-step sequential evaluation process in determining whether an individual is disabled. See 20 C.F.R. §§ 404.1520 and 416.920; see also Bowen v. Yuckert, 482 U.S. 137, 140-41 (1987). If at any step the ALJ determines that he or she can make a finding of disability or nondisability, a determination will be made and no further evaluation is required. See 20 C.F.R. §§ 404.1520(a)(4) and 416.920(a)(4); see also Barnhart v. Thomas, 540 U.S. 20, 24

1 (2003). The first step requires the ALJ to determine whether the individual is currently engaging in  
2 substantial gainful activity. 20 C.F.R. §§ 404.1520(b) and 416.920(b). Substantial gainful activity  
3 is defined as work activity that is both substantial and gainful; it involves doing significant physical  
4 or mental activities of the kind usually done for pay or profit. 20 C.F.R. §§ 404.1572(a)-(b) and  
5 416.972(a)-(b). If the individual is currently engaging in substantial gainful activity, then a finding  
6 of not disabled is made. If the individual is not engaging in substantial gainful activity, then the  
7 analysis proceeds to step two.

8 The second step addresses whether the individual has a medically determinable impairment,  
9 or combination of impairments, that is severe and significantly limits performance of basic work  
10 activities. 20 C.F.R. §§ 404.1520(c) and 416.920(c). An impairment or combination of  
11 impairments is not severe when medical and other evidence establish only a slight abnormality or a  
12 combination of slight abnormalities that would have no more than a minimal effect on the  
13 individual's ability to work. See 20 C.F.R. §§ 404.1521 and 416.921; Social Security Rulings  
14 ("SSR") 85-28, 96-3p, and 96-4p.<sup>4</sup> If the individual does not have a severe medically determinable  
15 impairment or combination of impairments, then a finding of not disabled is made. If the  
16 individual has a severe medically determinable impairment or combination of impairments, then  
17 the analysis proceeds to step three.

18 The third step requires the ALJ to determine whether the individual's impairments or  
19 combination of impairments meet or equal the criteria of an impairment listed in 20 C.F.R. Part  
20 404, Subpart P, Appendix 1. See 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526, 416.920(d),  
21 416.925, and 416.926. If the individual's impairment or combination of impairments meet or equal  
22 the criteria of a listing and meet the duration requirement (20 C.F.R. §§ 404.1509 and 416.909),  
23 then a finding of disabled is made. 20 C.F.R. §§ 404.1520(h) and 416.920(h). If the individual's  
24 impairment, or combination of impairments, does not meet or equal the criteria of a listing or meet  
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27 <sup>3</sup> An SSR constitutes the Social Security Administration's official interpretation of the statute and its regulations. See  
28 Bray v. Comm'r of Soc. Sec. Admin., 554 F.3d 1219, 1224 (9th Cir. 2009); see also 20 C.F.R. § 402.35(b)(1). An SSR is  
entitled to some deference as long as it is consistent with the Social Security Act and regulations. Bray, 554 F.3d at 1223  
(finding ALJ erred in disregarding SSR 82-41).

1 the duration requirement, then the analysis proceeds to step four, but, before moving to step four,  
2 the ALJ must first determine the individual's residual functional capacity ("RFC"). 20 C.F.R.  
3 §§ 404.1520(e) and 416.920(e).

4 The RFC is a function-by-function assessment of the individual's ability to do physical and  
5 mental work-related activities on a sustained basis despite limitations from impairments. See SSR  
6 96-8p. In determining the RFC, an ALJ must consider all relevant evidence, including all  
7 symptoms and the extent to which the symptoms can reasonably be accepted as consistent with the  
8 objective medical evidence and other evidence. 20 C.F.R. §§ 404.1529 and 416.929; SSR 96-4p  
9 and 96-7p. To the extent that statements about the intensity, persistence, or functionally limiting  
10 effects of pain or other symptoms are not substantiated by objective medical evidence, an ALJ must  
11 make a finding on the credibility of the individual's statements based on a consideration of the  
12 entire case record. The ALJ must also consider opinion evidence under the requirements of 20  
13 C.F.R. §§ 404.1527 and 416.927, and SSRs 96-2p, 96-5p, 96-6p, and 06-3p.

14 At step four, the ALJ must determine whether the individual has the RFC to perform past  
15 relevant work, which means work performed either as the individual actually performed it or as it is  
16 generally performed in the national economy within the last fifteen years or fifteen years prior to  
17 the date that disability must be established. See 20 C.F.R. §§ 404.1520(f) and 416.920(f). In  
18 addition, the work must have lasted long enough for the individual to learn the job and performed  
19 as substantial gainful activity. 20 C.F.R. §§ 404.1560(b), 404.1565, 416.960(b), and 416.965. If  
20 the individual has the RFC to perform his past work, then a finding of not disabled is made. If the  
21 individual is unable to perform any past relevant work or does not have any, then the analysis  
22 proceeds to step five.

23 The fifth and final step requires the ALJ to determine whether the individual is able to do  
24 any other work considering his RFC, age, education, and work experience. 20 C.F.R.  
25 §§ 404.1520(g) and 416.920(g). If he is able to do other work, then a finding of not disabled is  
26 made. Although the individual generally continues to have the burden of proving disability at this  
27 step, a limited burden of going forward with the evidence shifts to the Commissioner. The  
28 Commissioner is responsible for providing evidence that demonstrates other work exists in

1 significant numbers in the national economy that the individual can do. Yuckert, 482 U.S. at 146  
2 n.5.

## 3 **II. THE ALJ'S DECISION**

4 The ALJ followed the five-step sequential evaluation process set forth in 20 C.F.R.  
5 §§ 404.1520 and 416.920. AR 21-27. At step one, the ALJ found that Plaintiff had not engaged in  
6 substantial gainful activity since July 5, 2011. AR 22. At step two, the ALJ found that Plaintiff  
7 had medically determinable impairments: left shoulder atrophy due to brachial plexus injury,  
8 degenerative disc disease of the lumbar spine and obesity. AR 23. At step three, the ALJ found  
9 that Plaintiff did not have an impairment or combination of impairments that met or medically  
10 equaled a listed impairment in 20 C.F.R. Part 404, Subpart P, Appendix 1. Id. At step four, the  
11 ALJ found that Plaintiff had the RFC to perform light work as defined in 20 C.F.R. §§ 404.1567(b).  
12 Specifically, the ALJ found that Plaintiff could lift and/or carry 20 pounds, occasionally, and 10  
13 pounds frequently. In an eight-hour workday, he could sit, stand and/or walk for six hours. He was  
14 occasionally able to engage in all postural activities. However, he was limited to jobs requiring use  
15 of only his dominant right arm and/or hand. Id. The ALJ noted that Plaintiff could not perform any  
16 past relevant work. AR 26. Considering Plaintiff's age, education, work experience, and RFC,  
17 under step five, the ALJ determined that Plaintiff could perform other jobs that exist in significant  
18 numbers in the national economy. Id. The ALJ also noted that transferability of job skills was not  
19 material to the determination because, under a medical-vocational rules framework, Plaintiff was  
20 not disabled regardless of whether she had transferable job skills. Id. Accordingly, the ALJ  
21 concluded that Plaintiff was not disabled from the alleged onset date of July 5, 2011, until the date  
22 of the decision. AR 27.

## 23 **III. ANALYSIS**

24 Plaintiff seeks reversal or remand of the ALJ's decision for one reason. Plaintiff contends  
25 that in assessing the RFC, the ALJ erred by failing to provide legally sufficient reasons for rejecting  
26 Plaintiff's testimony as "not credible" despite the absence of medical evidence supporting that  
27 conclusion. Defendant responds that the ALJ's decision must be affirmed. Defendant argues that  
28 the ALJ properly found Plaintiff "not fully credible" by providing specific reasons supported by

1 substantial evidence to discount Plaintiff's subjective complaints. Plaintiff did not file a reply.

2 The ALJ's assessment of credibility is entitled to "great weight." *Weetman v. Sullivan*, 877  
3 F.2d 20, 22 (9th Cir. 1989). The ALJ is required to engage in a two-step analysis to evaluate  
4 credibility. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). First, the ALJ must determine  
5 whether the individual presented objective medical evidence of an impairment that could  
6 reasonably be expected to produce some degree of the pain or other symptoms alleged. *Id.* If so,  
7 "and there is no evidence of malingering, the ALJ can only reject the [individual's] testimony about  
8 the severity of symptoms if [the ALJ] gives specific, clear and convincing reasons for the  
9 rejection." *Id.* (quotation omitted). To support a finding of less than fully credible, the ALJ is  
10 required to point to specific facts in the record that demonstrate that the individual's symptoms are  
11 less severe than she claims. *Id.* at 592. "Factors that an ALJ may consider in weighing a claimant's  
12 credibility include reputation for truthfulness, inconsistencies in testimony or between testimony  
13 and conduct, daily activities, and unexplained, or inadequately explained, failure to seek treatment  
14 or follow a prescribed course of treatment." *Orn v. Astrue*, 495 F.3d 625, 636 (9th Cir. 2007)  
15 (quotation omitted).

16 The Court finds that the ALJ's finding that Plaintiff was not credible with respect to his  
17 subjective complaints of symptoms and functional limitations is supported by substantial evidence.  
18 The ALJ properly considered Plaintiff's daily activities when evaluating the credibility of his  
19 subjective complaints. AR 24. The ALJ noted Plaintiff stated that although it was difficult with  
20 one arm, he could attend to his personal care, prepare his own microwave meals and shop for  
21 groceries. AR 117-118. The ALJ reasonably concluded these statements undermined Plaintiff's  
22 claim to have totally disabling pain preventing him from performing any work activity. AR 24-25.  
23 See *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) ("The ALJ also pointed out ways in  
24 which [the individual's] claim to have totally disabling pain was undermined by her own testimony  
25 about her daily activities, such as attending to the needs of her two young children, cooking,  
26 housekeeping, laundry, shopping, attending therapy and various other meeting every week.").

27 The ALJ also pointed out that the medical evidence did not support Plaintiff's subjective  
28 complaints regarding the severity of his symptoms. AR 24. The ALJ observed that the records



1 showed Plaintiff's overall treatment history was sparse and fairly conservative, consisting of  
2 medications and instructions on follow up visits. AR 25, 203, 204, 206, 213, 275-281. Parra v.  
3 Astrue, 481 F.3d 742, 750-51 (9th Cir. 2007) (stating that "evidence of conservative treatment is  
4 sufficient to discount a claimant's testimony regarding severity of an impairment" (quotation omitted)).

5 The ALJ noted that aside from his left shoulder impairment, and lower back pain, the  
6 greater weight of the evidence showed no other symptoms or limitations. AR 24, 247-250.  
7 Treatment records reveal Plaintiff was vague about his chief complaints and that he complained  
8 about having kidney problems, an impairment that based on the records, did not exist. AR 24, 198.  
9 The ALJ noted that a physical examination of Plaintiff's upper extremities revealed no edema,  
10 normal range of motion and normal joints, in spite of tenderness. AR 24, 202. The ALJ observed  
11 that during a consultative examination, the doctor reported Plaintiff was able to move around the  
12 office without assistance, and that although physical examination revealed an atrophied deltoid  
13 muscle at Plaintiff's left shoulder, his right shoulder was normal. AR 25, 247. The ALJ observed  
14 that there was no evidence of tenderness in Plaintiff's dorsolumbar area (lower thoracic and upper  
15 lumbar area) and that he had normal range of motion. AR 25, 248. The ALJ pointed out that  
16 although records showed an assessment of scoliosis, x-rays showed no acute osseous or joint space  
17 abnormality. AR 25, 314, 317.

18 The ALJ also considered the opinion of a state agency reviewing physician who reported  
19 Plaintiff was limited to occasional reaching with his left upper extremity, but had no limitations  
20 with his right upper extremity. AR 26, 357. The ALJ also considered the opinions of a  
21 consultative examining physician, who opined Plaintiff was limited to lifting and carrying 10  
22 pounds with his left side, but could lift and/or carry 100 pounds occasionally with his right side and  
23 50 pounds frequently. AR 26, 249.

24 The ALJ concluded that aside from his left shoulder impairment, and lower back pain, the  
25 greater weight of the evidence showed no other symptoms or limitations. AR 24. The ALJ further  
26 concluded, in light of the objective findings, Plaintiff's daily activities, and the conservative  
27 treatment he had received, that Plaintiff's allegation that he was precluded from all work activity  
28 because of his physical impairments was not credible. AR. 24-26. The ALJ properly considered



1 Plaintiff's medical records in assessing his credibility. See 20 C.F.R. §§ 416.929(c)(1) & (2)  
2 (2014) (requiring consideration of medical history, medical signs and laboratory findings, and  
3 objective medical evidence in evaluating the extent and impact of alleged pain); Parra, 481 F.3d at  
4 750-51 (upholding credibility assessment where results of medical tests of functioning did not  
5 support subjective allegation); Batson v. Comm'r of Soc. Sec. Admin., 359 F.3d 1190, 1196 (9th  
6 Cir. 2003) (holding ALJ properly relied on objective medical evidence and medical opinions in  
7 determining credibility).

8 The Court finds that the ALJ carefully reviewed and weighed all relevant medical opinions,  
9 regulations, and guidelines and provided legally sufficient reasons for rejecting Plaintiff's  
10 testimony as not credible in determining Plaintiff's RFC and in rendering a final decision in  
11 Plaintiff's case. As such, this Court concludes that Plaintiff fails to establish the ALJ committed  
12 reversible error.

### 13 CONCLUSION AND RECOMMENDATION

14 Accordingly, **IT IS HEREBY RECOMMENDED** that Plaintiff's Motion for Reversal or  
15 Remand (ECF No. 19) be **denied**.

16 **IT IS FURTHER RECOMMENDED** that Defendant's Cross-Motion to Affirm (ECF No.  
17 22) be **granted**.

### 18 NOTICE

19 This Report and Recommendation is submitted to the United States District Judge assigned  
20 to this case under 28 U.S.C. § 636(b)(1). A party who objects to this Report and Recommendation  
21 may file a written objection supported by points and authorities within fourteen days of being  
22 served with this Report and Recommendation. Local Rule IB 3-2(a). Failure to file a timely  
23 objection may waive the right to appeal the District Court's Order. Martinez v. Ylst, 951 F.2d  
24 1153, 1157 (9th Cir. 1991).

25 DATED: September 17, 2015

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**C.W. Hoffman, Jr.**  
**United States Magistrate Judge**